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FILED
JAN 11 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 740

T. O. BRADBURY AND N. B. BURT,

Petitioners,

vs.

FRANK DENNIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on October 15, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix B. The Order of the District Court is printed in Appendix A.

JURISDICTION

The Court of Appeals judgment was entered October 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Within the meaning of 28 U.S.C. §1359, is an assignment of a claim by a Colorado corporation to an Oklahoma Citizen improperly or collusively made to invoke the jurisdiction of the District Court when, without such assignment, there is no diversity of citizenship, and when:

(a) The assignment was made by the corporation to its sole stockholder;

(b) The assignment was without present consideration;

(c) The assigning corporation was insolvent;

(d) The subject matter of the assignment consisted of an alleged claim for usury, which claim constituted the only asset of the corporation;

(e) The assignment was void under the substantive law of Colorado; and,

(f) The assignment was subject to attack and could be set aside by corporate creditors?

2. Is the test of jurisdiction that announced by the Court of Appeals for the Tenth Circuit; namely, that jurisdiction will be upheld when founded on an assignment void under state law unless "it would operate to serve a purpose which is unsuited to the good order of federal court administration?"

STATUTE INVOLVED

The statutory provision in question is 28 U.S.C. §1359:

"A district court shall not have jurisdiction of a civil

action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

STATEMENT OF THE CASE

Jurisdiction purports to be founded on diversity of citizenship. Plaintiff, a citizen of Oklahoma, is the assignee of a claim for usury said to have been charged by defendants, Colorado citizens, to plaintiff's assignor, the D. M. & E. Construction Company, Inc., a Colorado corporation (R. 3). In the absence of a valid assignment there is no diversity of citizenship.

Defendants challenged jurisdiction on the ground that the assignment was "improper or collusive" within the meaning of 28 U.S.C. §1359. The trial court upheld its jurisdiction, but certified its determination for interlocutory appeal under 28 U.S.C. §1292 (b), and the Court of Appeals for the Tenth Circuit permitted the appeal (R. 1). The trial court's decision was affirmed (App. B).

The record shows that plaintiff is the corporation's sole stockholder (R. 46). An assignment was executed by the corporation, purporting to assign to plaintiff all claims and demands which the corporation had against defendants (R.12). At that time, the corporation was insolvent, although plaintiff had either paid or had orally promised to pay many of the corporation's debts (R. 38).

There are no corporate minutes showing that the assignment was authorized by the board of directors, nor are there any minutes authorizing distribution of its assets in liquidation (App. A). The only minutes relied upon by plaintiff are back-dated minutes, hastily prepared during a recess in the trial court hearing, which purport to ratify past acts of the corporate directors and officers (R. 59). The claim is not reflected in the financial records of the corporation, and no entry was made in the corporate books showing the alleged assignment (R. 56-57).

When the claim was assigned to its sole stockholder without present consideration, the company was insolvent, and the claim was the corporation's only asset (R. 38).

Colorado law prohibits liquidation of an insolvent corporation, but the trial court concluded, "although the assignment might be voidable upon an attack thereon by the creditors of the corporation, that fact does not, as a matter of law, make the assignment either improper or collusive within the meaning of Title 28, United States Code, Sec. 1359, nor does it prevent the plaintiff from maintaining the action under the assignment" (R. 3).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Tenth Circuit conflicts with the decision of this Court in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, where the former statute was construed, and where it was held that, an assignment is sufficiently tainted with illegality to permit an attack on it by third persons, the assignment is "collusive or improper" for jurisdictional purposes.

2. 28 U.S.C. §1359, has never been construed by this Court, but identical language in former statutes has been said by this Court to have a meaning diametrically opposed to the meaning attributed to the same language by the Tenth Circuit.

3. The Court of Appeals for the Tenth Circuit has upheld jurisdiction when in fact Congress has expressly denied jurisdiction to the federal courts if the alleged diversity of citizenship rests on a collusive or improper assignment.

4. Where heretofore it has been held uniformly that federal court jurisdiction must be expressly conferred by Congress and that such jurisdiction must clearly appear, the Court of Appeals for the Tenth Circuit has opened a Pandora's box by holding that in a diversity case stemming

from an assignment, the test of jurisdiction is whether trial of the case "would operate to serve a purpose which is unsuited to the good order of federal court administration." If now, for the first time, "the good order of federal court administration" is the test of jurisdiction, this case is the most sweeping decision of our generation, and it will revolutionize long accepted concepts as to the jurisdiction of the United States District Courts. Any case can now be litigated in the federal courts if the jurisdictional amount is involved, because, if this assignment is neither collusive nor improper, those words are meaningless.

ARGUMENT

The Court of Appeals for the Tenth Circuit held that an assignment which may be set aside by third-party creditors under state law is neither collusive nor improper within the meaning of 28 U.S.C. §1359. In *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, this Court reached the exact opposite conclusion under an earlier statute which used language identical with that construed by the Tenth Circuit. This Court's decision in *Lehigh* was followed in *Miller & Lux v. East Side Canal & Irrig. Co.*, 211 U.S. 293.

The Tenth Circuit distinguished these two cases by misreading *Black & White Taxi Co. v. Brown and Yellow Taxi Co.*, 276 U.S. 518, which held that an assignment which was not subject to attack by anyone would be recognized for jurisdictional purposes. The opinion of the Court of Appeals fails to recognize that the facts of this case fit squarely within the rule applied in *Lehigh* and *Miller & Lux*, and that the facts here do not even approach the distinguishing feature of *Black & White*. Here, the assignment was and is subject to attack by third-party creditors, just as in *Lehigh* the assignment was subject to attack by third-party stockholders. This, we think, is the true distinction between *Black & White* and *Lehigh*, and, on the record here presented, *Lehigh* controls.

The Tenth Circuit applied its own distinction, but if that distinction be correct, the conclusion of the Court of Appeals is a perfect non sequitur. The Court said (App. B):

> "The obvious distinction lies in the fact that in Lehigh and Miller & Lux, the resident corporation remained in existence, and in full control of the foreign corporation, while in the Taxi case, the resident corporation was dissolved."

If that be the "obvious distinction", the assignment here was manifestly "collusive or improper", because, (1) the Colorado corporation is still in existence, and (2) the assignee is in complete control of it.

The case is one of first impression with this Court as to the meaning of 28 U.S.C. §1359, but, as we have seen, this Court has heretofore spelled out the meaning of identical language contained in former 28 U.S.C. §80. Prior to 1948, an assignment could not confer jurisdiction unless jurisdiction would have existed without the assignment (former 28 U.S.C. 41 (1)). Moreover, prior to the enactment of the present law, old Sec. 80 prohibited jurisdiction if "the parties to said suit have been improperly or collusively made or joined." The enactment of 28 U.S.C. §1359 permitted jurisdiction in instances where there was no diversity between assignor and defendant if the requisite diversity existed between assignee and defendant. But Congress carefully incorporated into the new law the language contained in old 28 U.S.C. §80, and the prohibition against jurisdiction founded upon improper or collusive assignments was left in the law.

Congress incorporated this language in the statute with a full awareness of the settled law announced in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327. There a Virginia corporation conveyed all of its assets to the Lehigh Co., a Pennsylvania corporation, without consideration. The conveyance was held to be "collusive or im-

proper" with the meaning of the then controlling 28 U.S.C. §80. This Court held that the conveyance was tainted with illegality, and that since third persons, not parties to the lawsuit, could set aside the transfer, the conveyance was sufficiently improper to defeat jurisdiction. Congress intended that this restriction continue when it enacted 28 U.S.C. §1359 in exactly the same words used in the earlier Act which had been construed by this Court.

Since the transfer under consideration in *Miller & Lux v. East Side Canal & Irr. Co.*, 211 U.S. 283, could be attacked by third persons, jurisdiction was denied in that case, and the rule of *Lehigh* was applied. However, in *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518, the assignment was upheld for jurisdictional purposes, because in that case the assignment was untainted, and no one could attack its validity. The Tenth Circuit notices that in *Black & White* the corporation was dissolved, but if, as the Tenth Circuit says, this is the ground for distinction, the applicability of the rule of *Lehigh* here is inescapable, because our corporation is still alive, and it is controlled by plaintiff.

We have here an assignment by an insolvent corporation to the corporation's sole stockholder. This assignment was prohibited by Colorado statute. Colorado Revised Statutes, 1953, 31-31-11 provide:

> "Distribution in partial liquidation—(1) (a) The Board of Directors of a corporation may, from time to time, distribute to its shareholders in partial liquidation, out of stated capital or capital surplus of the corporation, a portion of its assets in cash or property, subject to the following provisions: . . . "(b) No such distribution shall be made at a time when the corporation is insolvent or when such distribution would render the corporation insolvent."

That this assignment was illegal under Colorado law is settled by *Laybourn v. Wrape*, 72 Colo. 339, 211 Pac. 367,

and that plaintiff failed to show that the assignment was not in partial liquidation is a fact found by the trial court (R. 2-3). Since there is a presumption against jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, the illegality of this assignment must be and it was recognized by both the trial court and the Court of Appeals for the Tenth Circuit. The assignment being illegal under state law, it was subject to attack by third-party creditors of the still existent assigning corporation. Thus, whatever distinction is applied to *Lehigh* and *Black & White*, there is no federal court jurisdiction of this claim.

The Court of Appeals commented at the outset of its opinion (App. B):

> "Our difficult problem is one of ascertaining their true jurisdictional meaning at the time of the revision. As words used to delineate jurisdiction, they ought to be cast in black and white, but we find them in the decisional gray zone . . . . ."

At the end of its opinion, we find no light thrown on the subject, because the Court said (App. B):

> "All this means that the state of the law is left in the gray zone where we found it. Certainly no rule of thumb is suggested or stated. But, after all, it is the words of a federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration."

The Court of Appeals for the Tenth Circuit, then, has said that when jurisdiction is attacked, the trial court should accept or reject jurisdiction dependent upon its belief as to whether trying the case would be "unsuited to the good order of federal court adminstration." The Tenth Circuit has made jurisdiction a matter of discretion, and no more sweeping change in the settled principles of our law can be imagined. Under this rule, a court with an

uncrowded docket may have jurisdiction, but on busier days, there is no jurisdiction. This court did not intend *Lehigh* and *Black and White* to be thus distinguished. Jurisdiction either exists or it doesn't. "The good order of federal court administration" has never before been a test of jurisdiction, and this meaning cannot be read into the earlier uniformly followed decisions of the Court. This revolutionary pronouncement of discretionary jurisdiction cries out for review on certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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